FILE COPY

JUN

JAMES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 889

DOUGLAS H. McDONALD, TRUSTEE, *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

VINCENT B. WELCH
HAROLD E. MOTT
EDWARD P. MORGAN
ROBERT N. GREEN
710 Fourteenth Street, N. W.
Washington 5, D. C.

JAMES P. KEM
1625 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

WELCH, MOTT & MORGAN
710 Fourteenth Street, N. W.
Washington 5, D. C.
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

AUTHORITIES CITED

Page

CASES:

American Trucking Assns. v. United States, 344 U.S. 298 7-8

City of Dallas v. Civil Aeronautics Board, 221 F. 2d 501, cert. den. 348 U.S. 914 10

Civil Aeronautics Board v. State Airlines, 338 U.S. 572 8-10

Logansport Broadcasting Corp. v. United States, 210 F. 2d 24 6-7

Van Curler Broadcasting Corp. v. United States, 236 F. 2d 727 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 889

DOUGLAS H. McDONALD, TRUSTEE, *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Contrary to the contentions of respondents, this case involves a problem of broad significance relating to the rulemaking functions of regulatory agencies. It presents a direct test of the Commission's counter-proposal procedure. The Commission holds many rulemaking proceedings to consider changes in specific allocations contained in the Table of Television Assignments. It has fallen into the habit of never defining the scope of the proceeding in its notices of proposed

rule making initiating such proceedings. It merely invites comments addressed to the proposed allocations rule specifically set forth in its notice, as well as comments suggesting "counterproposals," and then, if it feels that a rule proposed as a "counterproposal" is one "falling within the general scope of the rulemaking proceeding," it will adopt it as the final rule in the case. An essential defect in this procedure is that the notice merely mentions a specific proposed change and and does not indicate how far beyond that rule the "general scope of the rulemaking proceeding" extends, leading to the jungle of confusion that WTVW has described in its Petition (Pet. 13-16). Here the Commission proposed "Evansville . . . Delete Channel 7" and adopted the rule: "Hatfield . . . Delete Channel 9," specifically relying on a purported power to adopt, without further notice, counterproposals falling within some undefined "general scope" of the proceeding (J.A., p. 53; par. 3, June 24, 1957, Memorandum, Opinion and Order).

There is no requirement that comments in rulemaking proceedings be served on anyone, because the identity of all persons interested in the rule making cannot be known. Thus, counterproposals which may be adopted in the case never come to the attention of persons who may have a direct interest in them, and such persons are deprived of the opportunity to comment. The respondents ignore the fact that the Commission had no way of knowing whether or not WTVW and the Channel 9 applicants were the only persons interested in the suggestion in comments that Channel 9 be deleted, and that the Commission could consequently have no legal choice except to issue a further notice announcing that the potential deletion of Channel 9 was part of the proceeding.

Respondents state:

> "As petitioners Owensboro admit (Pet. O. 19), the Commission customarily issues a notice of further rule making where it is necessary to afford interested persons an opportunity for full participation." (Resp. Br. 11).

It is true that there have been cases where the Commission has recognized the existence of Section 4 of the APA and has issued a further notice as a result of the submission of counterproposals. The termination of this case in its present posture portends the total extinction of such instances. Of course, the respondents do not deny, as they cannot, that the "counterproposal" procedure is a part of Commission practice. Indeed, the Commission here called it "well-established," and the Committee on Communications of the Administrative Law Section of the American Bar Association in its 1958 Report (in which no attorney for any of the petitioners played any part) expressed grave concern as to the legality of that procedure (WTVW Pet., App. C).

The only thing the respondents point to in support of their assertion that the June 26 Notice contained a "description of the subjects and issues involved" is the Report and Order in Docket No. 11532, which is referred to in the Notice. Respondents say that in that Report and Order the Commission "treated at some length the need for *area* deintermixture." (emphasis in original) (Resp. Br. 9). Yet, the respondents themselves in their footnote 5 quote from paragraph 31 of that document which alluded to "community or area" deintermixture. WTVW in its Petition showed through quotations that throughout that document the Commission spoke in terms of "community" deinter-

mixture: That Report and Order is a lengthy and ambiguous document, which could not legally alter the Notice, which by its terms limited the proceeding to changes with respect to Channel 7. Indeed, in paragraph 2 of the Notice, the Commission indicated that the Report and Order related to deintermixture of "individual communities," not to "areas."

Respondents also refer to matters and events not even alluded to in the Notice to justify their contention that Channel 9 could be deleted in the proceeding. They, as did the Court of Appeals, ignore the Congressional direction that notice must be "complete and specific" and assert, in effect, a legal principle that a private person must reason, infer, and deduce from history and extraneous events what rules are within the scope of a proceeding.

That the public did not know that the potential deletion of Channel 9 was involved is obvious from the fact that no one opposed the deletion of Channel 9 in the initial comments filed on December 3, 1956. The only thing in this record in opposition to the deletion of Channel 9 before the final decision was WTVW's brief opposition to that suggestion in its reply comments filed December 28, 1956, not as comments on the merits of the proposal, but to urge that the Commission reject the proposal at the threshold without issuing a further notice. There is voluminous material in this record before the final order in opposition to any change with respect to Channel 7, but a void exists with respect to similar material relating to Channel 9. The reason is that the scope of the proceeding was kept secret by the Commission. Channel 9, Hatfield, which two applicants had fought for during three years, was too valuable a commodity to be dis-

posed of in such a clandestine fashion. However, a further notice was not only fair, but was legally required by Section 4 of the APA.—

Respondents assert that, contrary to WTVW's arguments between pages 16 and 18 of its Petition, "the decision below does not rest on any finding that the notice requirements of the Administrative Procedure Act were here met because petitioners had actual notice in lieu of publication. . . ." (Resp. Br. 11). Not only do respondents contradict the Court's opinion, but they contradict themselves, for elsewhere in their brief they state that the Court "further held . . . that Channel 9 was within the scope of the proceeding since there had been actual notice of the Channel 9 counterproposals . . ." (Resp. Br. 10). "Actual notice" as used in Section 4 refers to knowledge of the agency's notice of rule making, in which the scope of the proceeding is supposed to be defined, not to knowledge of what a private person says in comments. The phrase was misinterpreted by the Commission and the majority below.

Respondents also contend that, contrary to WTVW's arguments between pages 21 and 22 of its Petition, the decision below does not rest on any finding that the Section 4 requirements were met because the Channel 9 applicants had the opportunity to petition for reconsideration (Resp. Br. 11). The following part of the decision of the majority below can only be construed as permitting deficiencies in an agency's observance of the Section 4 procedures to be remedied by the opportunity to petition for reconsideration:

> "The Owensboro-appellants thus again had full opportunity, then and there to act, with detailed knowledge of all aspects of that Report and Order.

> They were already in the case as parties. Even were it to be granted that there was some substance to their claim of lack of earlier notice of the full import of the contemplated rule making, after their motion to strike had been denied and the Commission's Report and Order had issued on March 1, 1957, they certainly were fully advised in the premises. They could have sought reconsideration under § 405 of the Act.' But, they chose to take no further steps." (p. 11, Slip Opinion).

Respondents cite five cases at the end of their brief, none of which is here applicable:

A. *Logansport Broadcasting Corp. v. United States*, 210 F. 2d 24, was an appeal from the nationwide rulemaking proceeding lasting over 43 months, and in which about 2,000 television assignments, comprising the Table of Assignments, were adopted. There the Commission did define the scope of the proceeding, putting everyone on notice that it was a nationwide proceeding involving channel assignments all over the country. The Commission went further and issued several intermediate notices of proposed rulemaking inviting comments on specific proposed allocations. Here, however, a limited notice, which by its terms involved only VHF Channel 7, became, through application of the counterproposal procedure, the basis for an expanded proceeding, whose scope the agency decided at last to announce in its final decision. The Commission here could have easily and conveniently issued a further notice and the proceeding could have been resolved quickly thereafter. Judge Fahy concluded that the Commission was obliged to rule on the objections to the involvement of the deletion of Channel 9 before actually deleting the channel, which (based on the outcome of the proceeding) would have been a

further notice that the deletion of Channel 9 was involved. *Logansport* also is distinguishable from this case since the Court there was ruling only on the claim of absence of notice of factors to be used in deciding whether the rule should be adopted, while this case involves the absence of notice of the very subject of the rule.

B. *Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727, was not even remotely related to the problem of notice of the scope of a proceeding. The Commission's notice there proposed the assignment of Channel 10 to Vail Mills, New York, and that was the rule adopted in the case.

C. In *American Trucking Assns.* v. *United States*, 344 U.S. 298, the ICC instituted a rulemaking proceeding concerning the adoption of proposed rules for the motor carrier industry, including rules pertaining to "trip leasing." The order instituting the proceeding declared all authorized carriers as parties respondent and set forth the practices to be investigated, four possible schemes of regulation, and suggested rules. About 80 witnesses presented testimony, after which the Examiner issued a report and proposed rules. The Examiner proposed rules abolishing trip leasing, but Division 5 of the ICC decided that it should be permitted, and amended his proposal. Objections were filed with the Commission and oral argument was held. The Commission's final report in effect adopted the Examiner's proposed rules.

One difference between that case and this is that there the Commission made all motor carriers who would be affected by the proposed rules parties to the proceeding, while here the Commission never hinted that the Channel 9 applicants were parties to this

proceeding. Secondly, there the original notice instituting the proceeding put all parties on notice that the potential abolition of trip leasing was involved, while here the original notice did not hint that Channel 9 might be deleted. Furthermore, the appellants there, unlike the petitioners here, made no claim that the notice requirements of Section 4 of the APA had been violated. In this respect, the Supreme Court stated: "There is no question but that the Federal Register notice and participation requirements were satisfied." (Footnote 18, 344 U.S., at p. 319). Another distinction is that in *American Trucking*, even if the original order did not give notice that trip leasing was involved (and the contrary was true), the Examiner's proposed rules did and there was ample opportunity to challenge the abolition of trip leasing before the rules were finalized by the ICC. Here, on the other hand, the final deletion of Channel 9 was the notice.

D. In *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572, Piedmont* and State had applied for different routes in a geographical area including all or part of 14 southeastern states. After consolidated hearings on the applications of State, Piedmont, and 23 other applicants for routes in the same general area, the Board awarded Piedmont new routes not specifically sought in its application and more nearly approximating those sought by State. State attacked this order on the ground, among others, that since Piedmont had not applied for the particular routes certified, State had had insufficient notice that the Board might consider Piedmont as a competing applicant, and hence had had no fair opportunity to present evidence dis-

* The summary of this case is a paraphrase of the summary contained in *City of Dallas* v. *Civil Aeronautics Board*, 94 U.S. App. D.C. 75, 221 F. 2d 501.

crediting Piedmont's fitness to serve those routes. The Court held that there was sufficient notice to State, even though Piedmont's application covered routes which differed from those awarded. The Court noted, in part, that State sought certificates in the same general area, was a participant in the same proceedings, and had argued against Piedmont before the Board. In short, State recognized Piedmont as a potential competitive applicant.

That case is inapplicable here since it was an adjudicatory proceeding involving interpretation of the Board's licensing power under Sections 401 (d) (1) and (2) of the Civil Aeronautics Act, while the present case involves the standards set forth in Section 4 of the APA. It is inconceivable that the requirements of Section 4 could be read out of the APA insofar as the Commission is concerned on the basis of a case which did not involve Section 4. Furthermore, State Airlines had been named as a party to that proceeding and knew that evidence presented by the 24 other parties might have a bearing on its chances for success. Here, however, the Channel 9 applicants never were apprised of the fact that they were parties, and did not regard themselves as such, as witnessed by their Motion to Strike. Moreover, the *State* case was initiated as a result of public applications by carriers for routes connecting chains of cities in a number of states, while this case was initiated by a limited Notice relating to one VHF channel. If the Commission is to convert limited television proceedings into regional or nationwide allocations proceedings, it is compelled by Section 4 to state in a notice that that is what the proceeding is about. Of course, even where a proceeding is announced as regional, the Commission should still define the geographical limits of the region, or else

confusion will exist as to what channel assignments and cities are encompassed within the proceeding. This Court should require the Commission to start to tell the public what the scope of these allocations proceedings encompasses.

E. The respondents also cite *City of Dallas* v. *Civil Aeronautics Board*, 94 U.S. App. D.C. 175, 221 F. 2d 501, cert. den. 348 U.S. 914. That case followed and applied the holding of the *State Airlines* case, and the same matters which distinguish the holding in the *State Airlines* case are applicable to the *Dallas* case.

CONCLUSION

For the foregoing reasons, in addition to those heretofore urged in the petition for writ of certiorari herein, it is respectfully submitted that said petition for writ of certiorari should be granted.

Respectfully submitted,

VINCENT B. WELCH
HAROLD E. MOTT
EDWARD P. MORGAN
ROBERT N. GREEN
710 Fourteenth Street, N. W.
Washington 5, D. C.

JAMES P. KEM
1625 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

WELCH, MOTT & MORGAN
710 Fourteenth Street, N. W.
Washington 5, D. C.
Of Counsel